NO. 33105

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

BRYAN ANTHONY MERRITT,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

Bryan Anthony Merritt ("Appellant") appeals from an October 20, 2005, order of the Wood County Circuit Court (Hill, J.) denying a motion to modify his sentence.

Appellant, arrested for several misdemeanors while on probation for a previous battery, pled guilty to a single obstructing charge. Notwithstanding this the magistrate accepted a plea to one misdemeanor and sentenced him to 45 days suspended, 6 months at the Parkersburg Day Reporting Center, and 40 hours of community service. The Appellant was represented by counsel at the time he entered his plea.

He now claims that, despite the court's willingness to give him chance after chance, he is the innocent victim of the political machinations of an unjust political machine.[1] There is no evidence

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[1]Apparently, Mr. Merritt was the Wood County Sheriff's son. The Appellant claimed that the head of the Day Reporting Center had a grudge against the Sheriff which she took out against his son. (R. 70.) The Appellant claims that the magistrate did not allow him to explore this potential bias. This is simply wrong. Defense counsel cross-examined her on this issue at an October hearing.

to support this accusation, but that does not seem to matter. He also offers this court a nonsensical legal argument which completely ignores the facts of the case.

II.

STATEMENT OF THE FACTS

The Appellant was originally charged by criminal complaint with Driving Under the Influence of a Controlled Substance, Obstructing a Police Officer, Possession of Marijuana, and Carrying a Concealed Deadly Weapon, *i.e.* a knife.[2] (Amend. R. 5-6.[3]) He was arraigned on January 5, 2005, by Wood County Magistrate Joyce Purkey.

On May 19, 2005, the Appellant pled guilty to one count of obstructing an officer. In return, the State dismissed the balance of the charges. The Appellant was represented by counsel at the plea.

The terms of the plea, as set forth in a handwritten paragraph at the end of the plea form are:

> [Defendant] agrees to plead guilty to obstructing for 6 months DRC,[4] 45 days suspended community service hours determined by Magistrate. [Defendant] will complete assessment and pay all costs of program.
>
> State agrees to dismiss 05 M-15, 17 and 19.
>
> No fines.

(Amend. R. 46-47.)

(R. 76-77.)

[2]The Appellant was on unsupervised probation for a prior battery conviction at the time he was arrested for these offenses. (10/20/05 Hr'g. Tr. at 8.)

[3]The Appellee filed a motion to supplement the record last October. Citations to the amended record are to those documents submitted as part of that motion.

[4]*See* W. Va. Code § 62-11a-1a(4).

The form is signed by Magistrate Purkey, the Appellant, and his counsel. Wood County Prosecuting Attorney Ginny Conley's signature is beneath the handwritten paragraph. (Amend. R. 47 .)

The Appellant was originally referred to the Wood County Day Report Center on May 19, 2005. (*Id.* at 48.) On July 12, 2005, the Appellant tested positive for Xanax. On July 26, 2005, the State filed a "Motion for Revocation" with the Magistrate Court of Wood County alleging that the Appellant had failed to perform community service, and had failed to verify that he had attended mandated NA/AA meetings. Because the Appellant agreed to attend a 10-day inpatient drug counseling treatment program the State dismissed the motion and the Appellant remained in the DRC project.[5]

On September 8, 2005, the State filed a "DRC Revocation" motion with the magistrate court alleging Appellant had failed to attend follow up treatments, failed to verify his attendance at NA/AA meetings, not signed in for two weeks, and failed to arrange to complete his community service. (Amend. R. 33.)

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[5]The Appellant's spin on this compromise is ridiculous. The Appellant while on probation for another offense was arrested. Instead of revoking his previous probation or sentencing him to jail on the present charges, the court placed him at the Day Reporting Center. In total disregard of the court's largesse, the Appellant violated the terms of this agreement. Instead of violating him the Day Reporting Center offered him a second chance. Instead of going to jail, he was permitted to enroll at the John Good Recovery Center for inpatient treatment. Once he was released, he again flouted the terms of his probation.

The Appellant claims that he should be rewarded for "dropping everything," leaving his family, and reporting to this inpatient program. Indeed, defense counsel actually argued that the DRC had no authority to offer him this chance, a suggestion which, had the court accepted it, would have lead to the Appellant's incarceration. He also commends himself for paying for the treatment. Again, this treatment was offered in lieu of jail.

Instead of smugly claiming martyr status, this Appellant should have been grateful for his good fortune.

Magistrate Purkey convened an evidentiary hearing on September 28, 2005, after which she revoked Appellant's probation, but stayed execution of the underlying sentence to allow counsel an opportunity to appeal her ruling to the circuit court. The magistrate permitted the Appellant to remain on bond during the pendency of his appeal conditioned upon his willingness to submit to random drug testing.

On October 5, 2005, the State filed a "Motion to Revoke Bond, Stay, and Day Report Center" asking the magistrate court to revoke its stay of Appellant's sentence, his bond, and his treatment program at the Day Reporting Center. It alleged that on or about September 28 (the date of the last hearing) the Appellant failed a urine screen.[6] The magistrate court convened yet another hearing on October 6, 2005, at the conclusion of which it revoked the Appellant's bond.

Appellant appealed and moved to modify his sentence. The circuit court held a hearing on October 20, 2005. After considering arguments of counsel, the court denied the Appellant's motion to modify his sentence.

The Appellant has completed serving his sentence.

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[6]The motion also alleges that the Appellant possessed the drugs appearing in his toxicology screen. Apart from the results of the drug test, the State had no evidence supporting this claim.

III.

ARGUMENT

A. THE COURT DID NOT DENY APPELLANT A STAY.

1. The Standard of Review.

Questions of law and interpretations of statutes and rules are subject to *de novo* review. Syl. pt. 1, in part, *State v. Duke*, 200 W. Va. 356, 489 S.E.2d 738 (1997).

2. Discussion.

The Appellant claims, "Rule 21(b) of the West Virginia Rules of Criminal Procedure for Magistrate Court required the Defendant-Appellant's sentence be stayed to allow the filing of a Petition for Modification of his Sentence." (Appellant's Brief at 13.) He then argues:

> To hold that a criminal defendant with counsel is denied a stay of sentence while he or she exercises his or her ability to petition to modify the sentence while an unrepresented criminal defendant is allowed to stay the sentence while seeking a petition to modify the sentence would be an improper and unconstitutional denial of due process and violate the rights of equal protection.

Rule 20.1(a) of the Rules of Criminal Procedure for Magistrate Courts provides:

> (a) Except for persons represented by counsel at the time of a guilty plea is entered, any person convicted of a misdemeanor in a magistrate court may appeal such conviction to the circuit court as a matter of right.

See also W. Va. Code § 50-5-13(a) (any person convicted of an offense in magistrate court has right to appeal conviction to circuit court); W. Va. Code § 50-5-13(e) (defendant may not appeal guilty plea if represented by counsel at time plea taken).

Rule 21 of the Rules of Criminal Procedure for Magistrate Courts provides:

> (a) The timely filing or granting of an appeal automatically stays the sentence of the magistrate.
>
> (b) Upon request by the defendant, the execution of a criminal judgment shall be stayed to allow for the filing of a motion for a new trial or a petition for

> modification of sentence. Upon timely filing of such motion or petition, the execution of a criminal judgment shall be stayed until the same has been decided. In addition to granting the request of the defendant, the magistrate shall require the defendant to post or continue a sufficient bond to assure any required further appearance.

The Appellant alleges that both the circuit court and the magistrate court improperly denied him a stay pending his appeal/motion for a sentence modification. This is simply not true. The Appellant, represented by counsel, pled guilty to one charge of obstructing an officer. The magistrate sentenced him to 45 days, suspended execution of his sentence, and placed him in the DRC program.

The magistrate court executed the underlying sentence when the Appellant failed to abide by the program's rules, but stayed the judgment under Rule 21. When the Appellant failed to comply with the terms of his bond the magistrate court revoked it and lifted the stay.

The next day the Appellant filed a petition for a writ of mandamus with the circuit court claiming that the magistrate lacked the authority to revoke the appeal bond and lift the stay.[7] (R. 1.) The court converted the petition into a motion to modify the Appellant's sentence. The Appellant never objected to the court's handling of his petition. On October 20, 2005, upon hearing arguments of counsel, the court affirmed the magistrate's original sentence. (R. 122-23.)

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[7]The Appellant contends that, instead of revoking Appellant's bond and lifting the stay, the magistrate vacated her September 28, 2005, order, finding that the Appellant's had never been entitled to an appeal bond or a stay. (R. 2.) Apart from the Appellant's characterization, there is nothing in the record to support his assertion. There is no order from the October 6, 2005, hearing, or a certified copy of the transcript.

B. THE CIRCUIT COURT'S RULING WAS NOT AN ABUSE OF DISCRETION.

1. The Standard of Review.

This Court reviews double jeopardy claims *de novo*. Syl pt. 1, in part, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996). The protection applies to successive punishments and to successive prosecutions for the same offense. *Witte v. United States*, 515 U.S. 389, 390-92 (1995).

This Court reviews sentencing orders under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands. Syl. pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997).

2. Discussion.

The Appellant next argues that the circuit court abused its discretion by failing to consider that the Appellant had completed his community service[8] by the time it heard Appellant's motion for modification of sentence.[9] This argument lacks merit.

Clearly, the Appellant was not a viable candidate for probation to begin with. Indeed, he was on probation when he was originally charged with the underlying offenses. He proceeded to violate his probation numerous times. The court's decision was well within reason.

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[8]The record demonstrates that the Appellant's efforts to comply with his community service obligations were dismal. (R. 86-87.)

[9]The Appellant also claims that the manager of the Day Reporting Center promised to release him early if he completed the inpatient drug treatment program. Director Null testified that she said she would consider releasing him early if he came back with two clean urine screens. This never happened. (R. 72-73.)

Clearly, Ms. Null did not have the authority to countermand a court order. Thus, even if she had released him he would remain on probation until the end of his six-month term.

The Appellant also argues that the imposition of sentence violated double jeopardy.[10] Appellant argues, "In this case the Circuit Court should have inquired into the congruent character of the punishments to determine whether, in fact, there was a multiplicate. When a defendant has been punished twice for one crime, the defendant should receive some equitable relief." (Appellant's Brief at 16.) Counsel for the State has no idea what the Appellant is trying to say.

The Appellant entered his guilty plea on May 19, 2005,[11] sentencing him to 45 days suspended and 6 months of probation. His term ended on November 19, 2005. The magistrate court revoked the Appellant's probation on September 28, 2005.[12] The circuit court affirmed the magistrate's decision by order entered October 20, 2005. (R. 122-23.)

Appellant's motion to modify his sentence does not serve as a separate criminal proceeding. Double jeopardy is not offended when a trial court imposes sentence upon revocation of a defendant's probation. The defendant is not convicted of a separate criminal act, although this act may form the basis of the revocation. Revocation is a statutory procedure tied to the original sentence.

C. THE APPELLANT'S CLAIM IS MOOT.

1. The Standard of Review.

> Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so to justify relief; second, while technically moot in the immediate context, questions

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[10]He does not challenge the circuit court's jurisdiction.

[11]Mr. Merritt did not enter the Day Report Center until late April 2005. (R. 39.)

[12]By this time the Appellant had completed 10 of the mandated 40 hours of community service. (R. 64, 83.) After his release from in patient treatment, his case worker instructed him to contact her in order to set up further community service obligations. He failed to do so. (R. 84-85.)

> of great public interest may nevertheless be addressed for the future guidance of the bar and the public; and, third, issues which may be repeatedly presented to the trial court, yet may escape review at the appellate level because of their fleeting and determinate nature, may be appropriately be decided.

Syl. pt. 1, *Israel by Israel v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 454, 388 S.E.2d 480 (1989).

2. Discussion.

The Appellant is no longer incarcerated. He does not allege that he continues to suffer any collateral consequences from the magistrate's decision. The magistrate court executed the Appellant's original sentence. The circuit court heard and rejected Appellant's Writ of Prohibition, and then rejected the Appellant's motion to modify.

The issue is not capable of repetition, yet evading review. There are procedural mechanisms by which a criminal defendant may request an emergency stay. He may file a petition for an extraordinary writ with the circuit court, or this court. Clearly, the issue is no longer relevant to the case at bar.

IV.

CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, the judgment of the Circuit Court of Wood County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By Counsel

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *"Brief of Appellee State of West Virginia"* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 31st day of January, 2007, addressed as follows:

To: J. C. Powell, Esq., and
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